SUPREME COURT, U. S.
SEP 27 19
No. 73-107
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALFRED HENRY MANUSZAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner asserts that evidence obtained by electronic interception should not have been admitted at trial, since, he contends, the order authorizing the interception was insufficient on its face, he did not receive the notice required by statute, and the interception was not minimized.

After a jury-waived trial on stipulated facts in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of having used interstate telephone facilities with intent to promote an illegal gambling business (18 U.S.C. 1952) and of having conspired to commit that offense (18 U.S.C. 371). He received concurrent six-month suspended sentences and was placed on probation for six months. He was fined $500 on the conspiracy count. The court of appeals affirmed (Pet. App. A).

Most of the evidence at trial was obtained from a court authorized electronic surveillance conducted by New Jersey State Police pursuant to an authorization under N.J.S.A. 2A: 156 A-1, *et. seq.* (New Jersey Wiretapping and Electronic Surveillance Control Act).[1] Before trial, petitioner filed a motion to suppress this evidence. The facts concerning the wire interception were stipulated; the motion was argued and denied by the district court in a written opinion (Pet. App. C). The court of appeals relied upon that opinion in affirming the conviction (Pet. App. A).

Petitioner raises here the same arguments that he advanced in support of his motion to suppress: (1) that the court order authorizing the interception was insufficient on its face since it failed to include (a) a description of the communications sought to be intercepted, (b) a statement indicating whether the interception was to be terminated when the described communication was first obtained, and (c) the requirement that the interception was to be terminated once the authorized objective was attained; (2) that the post-surveillance notice requirements of the state and federal statutes were not met as to petitioner; and (3) that the interceptions were not executed in a way which minimized the interception of communications not otherwise subject to interception.

Petitioner's first two contentions are answered in the opinion of the district court (Pet. App. C), upon which we rely. Regarding his third claim, which was likewise rejected by the courts below, we deem it appropriate to add the following.

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[1] The New Jersey statue is consistent with Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See 18 U.S.C. 2516(2).

The New Jersey statute requires that each interception order must contain a provision that the interception shall be "conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this act." NJSA 2A; 156 A-12f. Accord, 18 U.S.C. 2518(5); see *State* v. *Dye*, 291 A. 2d 825, 835 (N.J.), certiorari denied, 409 U.S. 1090. The order in this case contained the quoted provision.

Contrary to petitioner's contention, there was no purposeful refusal to abide by this provision of the order. The telephone intercepted had been identified as one used exclusively in the conduct of the illegal gambling activity. Calls were monitored only during the hours the business was known to be in operation. In these circumstances, it was reasonable for the state law enforcement officials to conclude that essentially all calls over that telephone during those hours would be expected to be subject to interception.[2] Indeed, the results of the interception fully confirm the soundness of this conclusion, since only 10 of the 530 calls intercepted did not involve gambling. Petitioner does not suggest that further efforts at minimization could have avoided even the overhearing of these 10 calls, nor that the interception of these calls itself requires suppression of the relevant evidence. In any event, the minimization provision requires only that the intercept procedure shall be conducted in such a way as to reduce to the minimum possible the number of intercepted communications which do not provide evidence relating to the commission of any of the

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[2] The law enforcement officials did direct that no conversations between persons under state indictment and their attorneys should be monitored.

offenses enumerated in the statute. *United States* v. *Focarile*, 340 F. Supp. 1033, 1044-1050 (D. Md.), affirmed on other grounds, *sub nom. United States* v. *Giordano*, 469 F. 2d 522 (C.A. 4), certiorari granted on other issues, 411 U.S. 905. The procedures here accomplished this; accordingly, the court of appeals correctly affirmed the district court's finding that the interception of nonpertinent communications was minimized.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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